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No. 601

In the Supreme Court of the United States

OCTOBER TERM, 1961

RAY C. BALLANTYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

Case:

McCandless v. *United States*, 298 U.S. 342 6

Statutes:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b)) 2

Internal Revenue Code of 1954, Sec. 7201 (26 U.S.C. 7201) 3

Miscellaneous:

1 Wigmore, Evidence, Sec. 17 (3d ed. 1940) .. 6

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was filed on December 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for income tax evasion, the district court erred in rejecting petitioner's offer of proof based on an alleged defense that monies received by petitioner constituted a repayment of indebtedness rather than taxable income.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

An indictment in two counts was returned against petitioner in the United States District Court for the Southern District of Texas, charging him with wilful attempted evasion of his income taxes for the years 1953 and 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. The indictment alleged that petitioner's actual net income was $22,503 for 1953 and $31,509 for 1954, whereas he had reported only $5,850 and $4,050 for the two years (R. 5–7). After a trial to a jury, petitioner was found guilty on both counts and sentenced to concurrent terms of two and a half years and to fines totalling $5,000 (R. 424–425). The court of appeals unanimously affirmed the conviction (Pet. 19–26, 28–30). The evidence to support the verdict may be summarized as follows:

Petitioner owned all the stock and was the managing officer of Balco, Inc., a corporation organized

in 1948 and engaged in construction work (R. 197–198). In 1950, after submitting a bid to the City of Pasadena, Texas, under the name Beco Engineering Specialities Company, a sole proprietorship,[1] petitioner entered into a contract to sell the city concrete pipe (R. 70, 263), the pipe to be installed by Balco under a separate contract with the city (R. 264). In 1953 petitioner received from the city in payment for the pipe $50,700 in checks made payable to Beco (R. 76). Petitioner, using the Beco name, had purchased the pipe from Standard Concrete Products Company at a cost of $33,696.58 (R. 306), and thus realized a net gain on the transaction of $17,003.42 (R. 310). Petitioner failed to report any part of this gain on his tax return for 1953 (R. 41, 331).[2] Petitioner kept no books or records concerning the Beco transactions (R. 193), advised his accountants through his bookkeeper that he had no other income for 1953 (R. 183), and reported as gross income that year only his salary of $6,500 from Balco (R. 41).

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[1] Petitioner opened a bank account in the name of Beco Engineering Specialties Company, indicating to the bank that he had a partner named Orin G. Bennett, and that the company name was registered with the County Clerk (R. 143). Petitioner later admitted to revenue agents that Orin G. Bennett was nonexistent (R. 320, 329). No record of Beco was found in the assumed name files of the County Clerk (R. 155).

[2] The government, to show a consistent pattern of underreporting income in the pre-indictment years, also proved that petitioner had omitted from gross receipts $131,858.80 in 1950, $105,774.80 in 1951, and $23,017.80 in 1952, sums received under the same contract for the sale of pipe (R. 76, 78). Petitioner's cost for the pipe in those years was $40,490.39 in 1950, $91,032.91 in 1951, and $21,032.73 in 1952 (R. 105).

In December 1953, using the name of B & B Products Company, a sole proprietorship, petitioner entered into a similar contract with the City of Pasadena for the sale of concrete pipe (R. 84, 330). In 1954 petitioner received $54,600 from the city in payment for the pipe, in a single check made payable to B & B Products Company (R. 84). Petitioner had purchased this pipe from the Bayou Concrete Pipe Company at a cost of $26,560.65 (R. 162, 312), and thus realized a net gain on this transaction of $28,039.35, none of which amount was reported by petitioner in his return for 1954 (R. 312). No books or records reflecting the receipt of income from this transaction were kept by petitioner (R. 194), no bank account was opened in the company's name (R. 328), and petitioner's only reported gross income for 1954 was his salary from Balco of $6,300 (R. 312).

ARGUMENT

Petitioner's sole argument is that the trial court erred by preventing him from making proof on cross-examination of his bookkeeper that monies received by him on the sale of the pipe, in the names of the Beco Company and the B & B Company, were not, and were not considered by him to be, taxable income, but were repayments of indebtedness owing to him from Balco. Petitioner's contention here is that Balco was indebted to him in unliquidated amounts on account of his transfer to that company of certain assets upon its incorporation in 1948, and the monies received by him from the Beco and B & B pipe sales were in fact or were considered to be re-

payments of Balco's indebtedness to him since he "considered this B & B and Beco simply an adjunct and a part of the Balco Company operation" (Pet. 4).

The adequacy of an offer of proof, and the correctness of the ruling thereon, must be tested at the time the offer was made. 1 Wigmore, *Evidence,* Sec. 17(b) at 319 (3d ed.). Recognizing the "common sense rule * * * as to admissibility" (Pet. 15), this Court declared in *McCandless* v. *United States,* 298 U.S. 342, 346—

> An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough.

In this case, however, it was petitioner—not the court—who erred by failing to state the "chain of proof" in which the offered facts would be "an appropriate link."

The only fact that petitioner offered to prove was that, upon Balco's incorporation in 1948, he had transferred to it, without payment, construction equipment, contracts in process, and all his business good will. As we now understand petitioner's theory, that was to be one element of an alleged defense which would also have required proof of the following facts: that, although no evidence of indebtedness was given and no debt recorded on the corporation's books, the transfer of the assets was, rather than a contribution to capital, a "sale" of the assets to the corporation for an unliquidated amount that it still "owed" him; that, although entered into in the name of the sole proprietor-

ships, Beco and B & B, the pipe contracts with the city were actually entered into on behalf of Balco; that, although never recorded on the corporation's books or reported in its income tax returns, the receipts under the contracts belonged to Balco rather than petitioner; that, although the moneys were paid directly to petitioner by the city without going through the corporation's bank account, they were "constructively" received by Balco and then paid over by it to petitioner; that, although no debt was shown on the corporation's books, the moneys were paid over to him, not as a dividend, but in payment for the assets transferred by him in 1948; and that petitioner's original cost basis for the assets transferred exceeded the total amounts received by him (including the amounts received in the pre-indictment years) so there was no "gain" on the "sale" of the assets for which he was required to account. Petitioner's theory, in short, is that the offense of which he was guilty was that of evading the corporation's income taxes rather than, as charged, his own.

Conceding that such a defense, if proved, would be sufficient and that the elements need not have been proved in any particular order, nevertheless it was petitioner's obligation, when objection was made to the initial question, to inform the court of its materiality by stating in understandable fashion the chain of proposed proof of which the elicited testimony (the bare fact that a transfer of assets had been made) was to be a part. That petitioner failed to do, and he thereby failed to meet his own standard of admissibility.

Thus, there was nothing in petitioner's offer, counsel's accompanying statements, or in the record prior to that time, which revealed the theory of defense or petitioner's intention or ability to prove its various elements. Despite the assertion in the petition that the trial court understood at the time of the offer "that the Beco and B & B funds belonged to Balco" (Pet. 9), the record is to the contrary. Similarly, the statement quoted at the outset of the petition that "Petitioner considered this B & B and Beco simply an adjunct and a part of the Balco Company operation" (Pet. 4), came into the trial as virtually the last question asked by petitioner's counsel (R. 334), long after the trial court had ruled on the offer of proof. An examination of the record leading to and including the offer (R. 199–208) reveals that petitioner made no reference whatsoever to this alleged relationship among the companies.

In fact, by the time of the offer, the evidence had already established, without challenge by petitioner, several facts that were in direct conflict with the theory of defense which petitioner now claims was before the court. Extensive testimony had been received showing that the companies had been created and treated as entities distinct from one another. Petitioner's bookkeeper had testified that Beco was set up by petitioner as a partnership, separate from Balco (R. 191–192), that none of the receipts of Beco or B & B under the Pasadena contracts were ever recorded on the books or records of Balco (R. 187, 193–194), and that petitioner had instructed him to keep the Beco

money separate and apart from the Balco books and records (R. 186–187) and to treat any of the money that was transferred to Balco from Beco as a loan from Beco (R. 187). The bookkeeper had testified further that this arrangement had in fact been followed over several years and that when monies received by Beco under the pipe contract with Pasadena were on occasion transferred to Balco, they were shown not as income to Balco but as a liability to Beco (R. 187–188). Although this damaging evidence was elicited prior to the offer of proof, petitioner never attempted to cross-examine his bookkeeper (who was obviously hostile to the government, R. 193) as to these points so vital to the alleged defense. Nor did petitioner make any explanation of these conflicting facts to the court at the time of the offer. Instead, in response to the court's inquiry as to the materiality of the offer (R. 202), petitioner stated only that money received from Balco (not Beco or B & B Companies) was not taxable income since petitioner had the right to "become financially even with the corporation," *i.e.*, Balco (R. 202, 204).

There is still further indication that petitioner failed to present an adequate foundation for admission of the proof. Twice following the conclusion of the evidence—in a colloquy with the court (R. 405) and in a motion for a new trial (R. 419)—petitioner cited the court's rejection of the offer as prejudicial error. Although petitioner acted on both occasions after the earlier reference (R. 334) to the alleged "adjunct" relationship of Beco and B & B Companies

to Balco, in neither case did he spell out the theory of defense which the petition now claims was before the court and understood by the court at the time of the offer. Thus, the motion for a new trial claims only that the money received "was considered a return to him of sums owing to him because of such prior transfer to Balco * * *" (R. 419), and is silent as to Balco's relation to Beco and B & B Companies and to the Pasadena contracts and the income therefrom, as well as the cost or value of the assets transferred and the extent of the unrecovered cost remaining after the very large receipts from the Beco and B & B transactions in the pre-indictment years.

These facts show that petitioner had not presented its current theory of defense to the court at the time of the offer. Indeed, they cast in serious doubt whether that theory had even established itself in petitioner's mind or the mind of his counsel, to say nothing of its being brought home to the court. Under the circumstances it was the inadequacy of petitioner's offer in failing to state, indicate or provide any basis for the court to understand the chain of proof to which the offer was an appropriate link which brought about the rejection of the proof. And since the offer was inadequate when made, petitioner cannot rely upon the court's ruling as an excuse for his failure to renew the offer at a later point in the trial when—if ever—the theory of defense was made clear.

CONCLUSION

The decision of the court of appeals affirming the conviction is correct, and no conflict of decisions or

important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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